A **KAVITHA KRISHNAN & ANOR**

v.

KERAJAAN MALAYSIA

B HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[CIVIL SUIT NO: 21 NCvC-154-07-2012]
7 JANUARY 2013

C ***CIVIL PROCEDURE:*** *Pleadings - Striking out - Failure to name government officer responsible for alleged tortious act as party - Whether pleadings fatally flawed - Whether disclosed reasonable cause of action - Whether abuse of process of court*

D ***LIMITATION:*** *Public Authorities Protection Act 1948 - Public officer's act - Whether fell within first limb of s. 2(a) of PAPA - Whether continuous injury or damage - Calculation of 36 month limitation period - Whether action time barred*

TORT: *Vicarious liability - Liability of government - Failure to name* E *government officer responsible for alleged tortious act as party - Effect of - Whether officer should be made party and his liability established before government could be made vicariously liable*

Enclosure 7 was the defendant's application to strike out the F plaintiffs' claim under O. 18 r. 19 of the Rules of Court 2012 ('ROC'). The defendant contended that the government could not be held to be vicariously liable because the plaintiffs did not name or join the public officer liable for the alleged medical negligence pursuant to ss. 5 and 6 of the Government Proceedings Act 1956 G ('GPA'). The defendant further contended that the plaintiffs' action was time barred under the first limb of s. 2(a) of the Public Authorities Protection Act 1948 ('PAPA').

Held (allowing encl. 7 with costs):

H **(1)** Applying ss. 5 and 6(1) of the GPA and the case of *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors*, the officer of the government who was responsible for the alleged tortious act must be made a party and his liability must be established before the government can be made vicariously liable. In the I instant case, the plaintiffs' writ summons and statement of claim were fatally flawed and rendered defective in view of the

failure to name the public officer who was responsible for the alleged medical negligence as a defendant. Therefore, the defendant's application to strike out the plaintiffs' claim was allowed under O. 18 r. 19(1)(a) as it disclosed no reasonable cause of action against the defendant and under O. 18 r. 19(1)(d) of the ROC on the ground that it was an abuse of the process of the court. (paras 8, 9 & 10)

(2) The first limb of s. 2(a) of the PAPA was not applicable to the facts. Instead, the instant case was governed by the second limb of s. 2(a) of the PAPA. On the facts, there was a continuance of injury or damage since both the plaintiffs were still HIV positive due to the blood transfusion. Therefore the limitation period to file the action would be 36 months after the ceasing of the continuance of injury or damage caused by the act. This meant that the limitation period of 36 months after the cessation of the wrongful act pursuant to the second limb of s. 2(a) of the PAPA had not started to run. (para 16)

Case(s) referred to:
Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(foll)***
Ronald Beadle v. Hamzah HM Saman & Ors [2007] 1 CLJ 421 CA ***(refd)***

Legislation referred to:
Government Proceedings Act 1956, ss. 5, 6(1)
Public Authorities Protection Act 1948, s. 2(a)
Rules of Court 2012, O. 18 rr. 19(1)(a), (b), (d)

For the plaintiff - Vanessa Wong; M/s Mah-Kamariyah & Philip Koh
For the defendant - Zetty Zurina; SFC

Reported by Sandra Gabriel

JUDGMENT

Yeoh Wee Siam J:

[1] This is an appeal by the plaintiffs against my decision on encl. 7 given on 21 November 2012.

A **Enclosure 7**

[2] This is the defendant's application to strike out the plaintiff's claim under O. 18 r. 19(1)(b) or (d) of the Rules of Court 2012 ("the ROC").

B **Court's Decision Regarding Encl. 7**

[3] The defendant's application is allowed. Costs of RM1,000 are to be paid by the plaintiffs to the defendant.

C **Grounds For The Court's Decision**

[4] The main ground for allowing the application is because the plaintiffs did not name or join the public officer liable for the alleged medical negligence or default. This is required by s. 5 and s. 6 of the Government Proceedings Act 1956 ("the GPA") ("Act
D 359").

[5] Section 5 and s. 6(1) of the GPA provide:

> Liability of the Government in tort
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> E 5. Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his
> F agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.
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> G Limits of liability of the Government
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> 6. (1) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

H

[6] From s. 5 of the GPA it is clear that the Government of Malaysia is only vicariously liable for any wrongful act done or any neglect or default committed by of any public officer to the same extent as that of a principal for his agent.

I

[7] Under s. 6(1) of the GPA, the Government of Malaysia cannot be sued by virtue of s. 5 unless such proceedings for damages would have lain or can be commenced against such public officer personally.

[8] Applying s. 5 and s. 6(1) of the GPA, the plaintiffs can only file proceedings against the Government of Malaysia if the public officer, who can be personally liable for the alleged tort, is named as a defendant in the action.

[9] In *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663, the Federal Court stated:

> Therefore, on a proper construction of ss. 5 and 6 of Act 359, in any claim in tort against the Government, the officer of the Government who was responsible for the alleged tortious act must be made a party and his liability must be established before the government can be made liable vicariously as principal. It would be insufficient to merely indentify the officer as a party because liability by evidence needed to be established. It is only upon a successful claim against the officer personally can a claim be laid against the government. (see also Court of Appeal case, *Government of the State of Sabah v. Syarikat Raspand* [2010] 7 CLJ 945).

[10] The plaintiffs' writ of summons and statement of claim are fatally flawed and rendered defective in view of the failure to name the public officer who is responsible for the alleged medical negligence as a defendant in this action. For this reason, I allowed the defendant's application to strike out the plaintiff's claim under O. 18 r. 19(1)(a) of the ROC on the ground that it discloses no reasonable cause of action against the defendant, and under O. 18 r. 19(1)(d) of the ROC on the ground that it is otherwise an abuse of the process of the court. This is a plain and obvious case for striking out the plaintiffs' claim. There is no necessity for the action to go for full trial.

[11] Counsel for the defendant submitted that this action is time barred under the first limb of s. 2(a) of the Public Authorities Protection Act 1948 ("the PAPA").

[12] Section 2(a) of the PAPA provides:

> Protection of persons acting in execution of statutory or other public duty
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> 2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceedings is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
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> (a) the suit, action, prosecution or proceedings shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

[13] The defendant's contention is that the plaintiffs should commence proceedings within 36 months from the act complained of ie, the act, neglect or default, as required by the first limb of s. 2(a) of the PAPA. However, the plaintiffs filed the action on 6 July 2012 which is beyond the 36 months from the date of the one act of giving the blood transfusion on 5 April 2001 by the public officer, which 36 months would expire on 4 April 2001. Counsel for the defendant submitted that this is not a case of several continuing acts of giving the blood transfusion. Therefore, the second limb of s. 2(a) of the PAPA should not apply.

[14] In *Ronald Beadle v. Hamzah HM Saman & Ors* [2007] 1 CLJ 421, p. 432; [2007] 2 MLJ 201 the Federal Court at p. 209, regarding s. 2(a) of the PAPA, stated:

> [18] This section was also succinctly explained by Wan Sulaiman J (as he then was) in the case of *Mak Koon & Anor v. Municipal Councillors, Malacca* [1967] 1 MLJ 256. After referring to the English Court of Appeal case of *Carey v. Metropolitan Borough of Bermondsey* 20 TLR, the learned Judge said this at p 259:
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> > Court of Appeal held in respect of that section of the English Act which is in *pari materia* with our s. 2(a) that 'the language of the section was reasonably plain and it was manifest that the continuance of the injury or damage meant the continuance of the act which caused the damage'. Time would therefore begin to run for the purposes of the

Ordinance, from the time the act was caused, not from the time when the injury or damage ceased, or in the case of a continuing injury or damages, when the act causing the injury or damage ceased.

[15] In my view, the plaintiffs' claim is time-barred if one interprets the phrase "continuance of injury or damage" to be confined to the act complained of ie, the blood transfusion which caused the plaintiffs to suffer from the HIV.

[16] However, I do not think that the facts of this case fall within the first limb of s. 2(a) of the PAPA. I am of the opinion that this case is governed by the second limb of s. 2(a) of the PAPA. This is a case where there is "a continuance of injury of damage". Therefore, the limitation period to file the action would be 36 months after the ceasing of the continuance of injury or damage caused by the act, neglect or default complained of. The plaintiffs are still continuing to suffer from the symptoms of the HIV or the injury or damage caused by the blood transfusion administered by the public officer of the defendant. Both plaintiffs are now still HIV positive. Therefore, the injury or damage suffered by both plaintiffs have not ceased, which means the limitation period of 36 months after the cessation of the wrongful act, neglect or default has not even started to run yet.

[17] It is arguable whether this case falls within the first or second limb of s. 2(a) of the PAPA. Here, I would like to give the benefit of the doubt to the plaintiffs and hold that the plaintiffs' claim is not time barred under the second limb of s. 2(a) of the PAPA.